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In the Supreme Court of the United States

OCTOBER TERM, 1989

DEWITT BANK AND TRUST COMPANY, CONSERVATOR OF THE ESTATE OF WILLIAM LANCE MCNEELY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether 33 U.S.C. 702c, which provides that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place," bars petitioner's action under the Federal Tort Claims Act for damages arising from injuries suffered in a lake that is part of a multi-purpose federal project whose functions include flood control.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 18-21) is reported at 878 F.2d 246. The opinion of the district court (Pet. App. 1-17) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 1989. A petition for rehearing was denied on September 7, 1989 (Pet. App. 22). The petition for a writ of certiorari was filed on November 25, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is the conservator of the estate of William Lance McNeely. McNeely was seriously injured when he dove into Merrisach Lake in Arkansas and struck his head on the lake bottom. Pet. App. 4, 19.

Though it was once a natural body of water, Merrisach Lake has been modified as part of the McClellan Kerr Project. The purposes of this project include flood control and the improvement of navigation on the Arkansas River. In connection with the McClellan Kerr Project, the Army Corps of Engineers routed a canal through Merrisach Lake and constructed a dam and a lock in its vicinity. The water impounded by the dam and lock has increased the boundaries and altered the configuration of Merrisach Lake. Pet. App. 1-2, 19.

McNeely was injured at Merrisach Park, a park developed by the Corps of Engineers on the shore of the lake. To prevent erosion of the lake shore, the Corps built a retaining wall along the water's edge. The water at the base of the retaining wall is shallow; its precise level fluctuates as the Corps retains or releases water at the nearby lock and dam. McNeely was injured when he dove from the retaining wall into the lake late at night during an attempt to rescue a friend. Pet. App. 19.

2. Petitioner filed this action under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, in the United States District Court for the Eastern District of Arkansas. After a trial, the district court concluded that the government was liable for McNeely's injuries and

awarded damages totalling $980,700 against the United States. Pet. App. 1-17.[1]

3. The court of appeals reversed, holding that the government was immune from liability under the Flood Control Act of 1928, 33 U.S.C. 702c. Pet. App. 18-21.[2] Quoting from this Court's decision in *United States* v. *James*, 478 U.S. 597, 608 (1986), the panel noted that Section 702c was intended "to ensure beyond doubt that sovereign immunity would protect the [g]overnment from 'any' liability associated with flood control." Pet. App. 19. Thus, the court continued, the immunity conferred by that statute "shields the government from tort claims arising from construction or management of federal flood control projects." *Id.* at 20. The court pointed out that "[f]lood control was an essential component of the multiple purpose project that expanded Merrisach Lake" and concluded, accordingly, that the lake's waters were "flood waters" for purposes of the statute – *i.e.*, waters "contained in

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[1] The district court's opinion focused on the Arkansas Recreational Use Statute, Ark. Code Ann. § 18-11-301 *et seq.* (1987), which generally exempts operators of recreational facilities from liability for negligence. The court concluded that this case fell within an exception to the statute that permits recovery in the event of a "malicious, but not mere negligent, failure to warn against an ultra-hazardous condition, structure, personal property, use or activity actually known to such owner to be dangerous." Pet. App. 5-15.

[2] The government did not plead the Flood Control Act as a defense in its answer to the complaint, but did raise that defense in its trial brief. The district court did not address the applicability of the statute. The court of appeals noted that the Flood Control Act presented a jurisdictional defense and thus considered it on appeal. Pet. App. 19.

* * * a federal flood control project for purposes of or related to flood control." *Ibid.* (quoting *James*, 478 U.S. at 605). Finally, the court rejected petitioner's argument that Section 702c did not apply because McNeely's injuries resulted from the project's recreational, rather than flood control, operations. Pet. App. 20.[3]

ARGUMENT

1. Section 702c provides that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place * * *." In *James*, this Court held that the terms "flood" and "flood waters" (478 U.S. at 605):

> apply to all waters contained in or carried through a federal flood control project for purposes of or related to flood control, as well as to waters that such projects cannot control.

In this case, it is established that flood control is among the purposes of the McClellan Kerr Project. The district court noted that this multi-purpose project was undertaken "[i]n order to keep the channel [of the Arkansas River] open and exercise some flood control." Pet. App. 1. Likewise, the court of appeals held that "[f]lood control was an essential component of the multiple purpose project that expanded Merrisach

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[3] In this portion of its opinion, the court observed that "[i]n operating the project for flood control and navigation," the Corps maintained the waters in Merrisach Lake at the shallow level at which they stood at the time of the accident. In fact, the lock and dam that regulate the level of the lake are navigational works. But, as noted above, the lake is part of a multi-purpose project, one of whose major purposes is flood control.

Lake." Pet. App. 20. In its present configuration, therefore, Merrisach Lake undoubtedly consists of "waters contained in or carried through a federal flood control project" and falls squarely within *James*' definition of "flood waters."

Because Merrisach Lake is part of a multi-purpose project whose functions include flood control, there is no conflict between the decision in this case and *Graci* v. *United States*, 456 F.2d 20 (5th Cir. 1971), cert. denied, 412 U.S. 928 (1973). See Pet. 17-19. In *Graci*, owners of property along the Mississippi River-Gulf Outlet, a navigation project constructed by the Corps of Engineers to provide a short-cut from the Gulf of Mexico to New Orleans, sought to recover for damages suffered when hurricane-driven waters overflowed the outlet and flooded their property. The government did not contend that the project had any flood control function, 456 F.2d at 22, and the Fifth Circuit noted that the question presented by Section 702c was whether that statute protected the United States from liability that was "*unconnected with flood control projects*," *id.* at 26 (emphasis in original). See *James*, 478 U.S. at 601-602 n.2 (*Graci* held that Section 702c "conferred immunity only for floods or flood waters connected with a flood control project"). The project at issue here is not "unconnected" with flood control.[4]

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[4] *James* establishes that Section 702c is applicable to a multi-purpose project – *i.e.*, one whose functions include, but are not limited to, flood control. In both of the cases that the Court decided in *James*, the plaintiffs were engaged in recreational activities on waters included in federal flood control projects at the time they were injured. 478 U.S. at 599, 601. Indeed, in one of the cases, the plaintiffs cited literature in which the

2. This is one of three cases since *James* in which the courts of appeals have held that the government is immune under Section 702c from claims arising from alleged negligence in connection with the operation of recreational facilities located on lakes included in flood control projects. See *McCarthy* v. *United States*, 850 F.2d 558 (9th Cir. 1988), cert. denied, 109 S. Ct. 1312 (1989); *Dawson* v. *United States*, No. 89-3371 (3d Cir. Jan. 16, 1990). All three decisions have concluded that the waters included in such lakes are "flood waters" for purposes of Section 702c and thus that the government is entitled to immunity under the statute. Pet. App. 19-21; *McCarthy* v. *United States*, 850 F.2d at 561-563; *Dawson* v. *United States*, slip op. 5-6.[5] These courts have also refused to allow plaintiffs to avoid Section 702c's reservation of sovereign immunity by

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government had promoted the recreational features of a flood control lake. *Id.* at 599. Before *James*, numerous decisions had applied Section 702c to multi-purpose projects. See *Aetna Ins. Co.* v. *United States*, 628 F.2d 1201, 1203 (9th Cir. 1980) (collecting cases), cert. denied, 450 U.S. 1025 (1981).

[5] In *McCarthy*, the plaintiff was seriously injured when he dove into shallow water at a recreational area on a lake created as part of a flood control project. He alleged that the government had been negligent in the manner in which it constructed and maintained the recreational area in which the injury occurred, in encouraging swimming and diving there, and in failing to warn of its hazardous condition. The Ninth Circuit affirmed the dismissal of the complaint. Contrary to petitioner's contention (Pet. 19-20), there is no significant factual distinction between *McCarthy* and this case.

Similarly, in *Dawson*, the Third Circuit affirmed the dismissal of two actions arising from drownings at a swimming area in a flood control lake.

casting their claims in terms of a failure to warn or by arguing that their injuries have arisen from operations wholly unrelated to flood control. Pet. App. 20; *McCarthy* v. *United States*, 850 F.2d at 561-563; *Dawson* v. *United States*, slip op. 7-8.

Similarly, in *Mocklin* v. *Orleans Levee District*, 877 F.2d 427 (1989), the Fifth Circuit held that Section 702c barred a claim against the government arising out of a drowning in a channel that had been dredged to facilitate the movement of equipment needed for the construction of flood control levees. The court reasoned that the water in the channel was "flood water" as that term had been construed in *James*, that the presence of the water had contributed to the drowning, and that the government was therefore immune. The panel rejected the claim, analogous to petitioner's here, that the death was unrelated to a flood control project because it was attributable to channels that had been "negligently designed for navigation." 877 F.2d 430 n.6.

Although in *James* the recreational users of flood control lakes were injured or killed by releases of water through federal dams, the reasoning of the Court in that case supports the decision here and the other circuit-level decisions that have upheld the government's immunity under Section 702c. *James* emphasized that the government's immunity under that provision extends to liability of "*any* kind * * * for *any* damage from or by floods or flood waters at *any* place," adding that it is "difficult to imagine broader language." 478 U.S. at 604 (emphasis in original). The legislative history, the Court noted, shows "that the sweeping language of § 702c was no drafting inadvertence" and that "Congress clearly sought to ensure beyond doubt that

sovereign immunity would protect the Government from 'any' liability associated with flood control." *Id.* at 608. The Court made clear that Section 702c extends to claims framed in terms of failures to warn recreational users of hazards on flood control lakes, explaining that "the manner in which to convey warnings, including the negligent failure to do so, is part of the 'management' of a flood control project." 478 U.S. at 609-610. Finally, with respect to claims targeted at the allegedly recreational aspects of a flood control project, one of the court of appeals decisions reversed in *James* had held that the government was not immune if "a producing cause of the damage or injury is a government employee's negligence in omissions or commissions that diverge from acts strictly for the purpose of controlling floods or flood waters * * *." *James* v. *United States*, 760 F.2d 590, 603 (5th Cir. 1985).

Contrary to petitioner's contention (Pet 11-15), there is no conflict between the decision in this case and that in *Denham* v. *United States*, 834 F.2d 518 (5th Cir. 1987). Although the district court in *Denham* held that Section 702c did not bar a suit against the government by a recreational user of a flood control lake, the issue was not raised on appeal and the Fifth Circuit had no occasion to consider it. The language that petitioner quotes from the Fifth Circuit's opinion in *Denham* (Pet. 11) addressed only the applicability of the discretionary function exception of the Federal Tort Claims Act, 28 U.S.C. 2680(a). 834 F.2d at 521. All references to Section 702c that are quoted in the petition (Pet. 11-12) are from the district court's opinion.

In a recent decision not cited in the petition, the Tenth Circuit has declined to extend the government's

immunity under Section 702c to a recreational injury in a multi-purpose flood control lake. *Boyd* v. *United States*, 881 F.2d 895 (1989). In that case, a swimmer snorkeling in a flood control lake was injured by a power boat; his complaint alleged that the government was negligent in failing to warn swimmers that boating was permitted in the area in which the accident occurred and in failing to zone the lake to prohibit boating in that area. The court of appeals reversed a decision dismissing the complaint on the basis of the discretionary function exception, remanded for further consideration of a state recreational use statute similar to the one involved in this case, and held that Section 702c did not bar the suit. With respect to Section 702c, the Tenth Circuit stated that "Congress' concern was to shield the government from liability associated with flood control operations * * * not liability associated with operating a recreational facility." It held that "[w]ithout attempting to delineate for every conceivable situation the necessary link between flood control activities and injuries sustained at a flood control project before § 702c immunity applies, in the present case * * * the requisite nexus has not been established." 881 F.2d at 900.

The court in *Boyd* was critical of the reasoning of *McCarthy*, 881 F.2d at 900 & n.6, and adopted a more limited view of Section 702c than that applied in *McCarthy*, *Dawson*, or this case. But while *Boyd* held that Section 702c requires some "link" or "nexus" (881 F.2d at 900) between flood control activities and a plaintiff's injuries, the panel expressly declined to establish any general standard to govern that question.

Thus, it is unclear how broadly the Tenth Circuit may read *Boyd* in the future.[6]

The court of appeals' decision in this case is consistent with *James*, a case in which, less than four years ago, this Court applied Section 702c to injuries arising from recreational activities. With the exception of *Boyd*, in which the panel focused on the particular facts and declined to articulate any general standard, no court of appeals decision after *James* has reached a different conclusion. Under these circumstances, we submit that the issue of Section 702c's applicability to accidents of the type at issue here does not now warrant this Court's attention.

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[6] Any conflict between the court of appeals' decision and *Hayes* v. *United States*, 585 F.2d 701 (4th Cir. 1978), does not warrant this Court's review. In *Hayes*, a decision that predated *James*, the Fourth Circuit, in a two-page opinion, purported to recognize a distinction between those operations of a multi-purpose project that are related to its flood control function and those that are not. 585 F.2d at 702-703. To the extent that the brief opinion in *Hayes* might be read to support petitioner's claim, the decision must be deemed to have been qualified by *James*. As noted above, *James* emphasized the breadth of Section 702c's plain language and legislative history, confirming that Congress's intention was to protect the government "from 'any' liability associated with flood control." 478 U.S. at 608. Any suggestion to the contrary in *Hayes* would have to yield to this Court's reading in *James* of the plain language of Section 702c. Although the Court's opinion in *James* included a reference to *Hayes* (and an accompanying parenthetical) in a string citation in a footnote (478 U.S. at 605-606 n.7), the same footnote cited with approval to *Morici Corp.* v. *United States*, 681 F.2d 645, 647-648 (1982), in which the Ninth Circuit specifically rejected the *Hayes* court's suggestion that immunity depends on "the particular use to which the project was being put when the negligence occurred." *Id.* at 677.

3. Contrary to petitioner's suggestion (Pet. 20-21), the court of appeals' decision did not entail any improper review of the district court's findings of fact. The district court noted – and there can be no genuine dispute – that the functions of the McClellan Kerr Project include flood control. Pet. App. 1, 2-3. In substance, the court of appeals held that this undisputed fact was sufficient to establish the government's entitlement to immunity under Section 702c. This case therefore does not present any question concerning the application of Fed. R. Civ. P. 52's well-established standard for appellate review of findings of fact.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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